

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 85/2024 OF 30TH AUGUST 2024

BETWEEN

LINDUM SYSTEMS LIMITED APPLICANT

AND

**ACCOUNTING OFFICER,
AGRO CHEMICAL AND FOOD
COMPANY LIMITED 1ST RESPONDENT**

**AGRO CHEMICAL AND FOOD
COMPANY LIMITED 2ND RESPONDENT**

Review against the decisions of the Accounting Officer Agro Chemical and Food Company Limited in relation to Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services and Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services (Re-advertisement).

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb, I. P | - | Chairperson |
| 2. QS. Hussein Were | - | Member |
| 3. Ms. Jessica M'mbetsa | - | Member |



IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

Ms. Desma Nungo

LINDUM SYSTEMS LIMITED

- Advocate, NOW Advocates LLP

RESPONDENTS

ACCOUNTING OFFICER, AGRO CHEMICAL AND FOOD COMPANY LIMITED & AGRO CHEMICAL AND FOOD COMPANY LIMITED

1. Edwin Owiti - Agro Chemical and Food Company Limited
2. Amos Mwaighonyi - Ag. Manager Supply Chain Management

BACKGROUND OF THE DECISION

The Tendering Process

1. Agro Chemical and Food Company Limited, the Procuring Entity and 2nd Respondent herein invited sealed bids in response to Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 4th April 2024 in the Daily Nation and published on the Procuring Entity's website www.acfc.co.ke and on the Public Procurement



Information Portal (PIIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was on 24th April 2024 at 1230 hrs.

Addendum

2. Vide Addendum No. 1 dated 12th April 2024 (hereinafter referred to as "Addendum No. 1"), the Procuring Entity issued additional requirements forming part of the evaluation criteria provided at Stage 1: Preliminary examination for determination of responsiveness of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 24th April 2024 which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of sixteen (16) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	Name
1.	Complex Matrix Security Services
2.	All Tarms Security Services
3.	Action Rift Security Limited
4.	Pride Kings Services Limited
5.	BABS Security Services Limited
6.	Lavington Security Limited
7.	Canon Security Kenya Limited
8.	Masterfound Investment Limited
9.	Hounslow Security Limited
10.	Surveillance Kenya Limited
11.	Lindum Systems Limited
12.	Chakra Company Limited
13.	Cotec Security Limited
14.	Kenya Kazi Services Limited
15.	Davian Security Limited
16.	H-Hour Security Company Limited

Evaluation of Tenders

4. A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of the sixteen (16) tenders as captured in the Tender Evaluation Report dated 24th May 2024. The evaluation was done in the following stages:



- i Preliminary/Mandatory Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation

Preliminary/Mandatory Evaluation

5. The Evaluation Committee carried out a Preliminary/Mandatory Evaluation and examined tenders for responsiveness against the mandatory requirements set out in Stage 1: Preliminary examination for determination of responsiveness of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document read with Addendum No. 1. Tenderers were required to meet all the mandatory requirements at this stage to proceed to Technical Evaluation.
6. At the end of evaluation, four (4) tenders were determined non-responsive, while twelve (12) tenders were determined responsive. The responsive tenders proceeded to Technical Evaluation.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Stage 2: Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 27 to 29 of the Tender Document. Tenders were required to attain a pass mark of 70% and above to proceed to Financial Evaluation.
8. At the end of evaluation at this stage, three (3) tenders were determined non-responsive while nine (9) tenders were determined responsive

having met the minimum pass mark of 70% and proceeded to Financial Evaluation.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 3: Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 27 to 29 of the Tender Document. Evaluation at this stage would involve verification of the financial offers and checking for arithmetical errors, omissions and comparison of prices among bidders. The total lowest priced bid would be considered best evaluated bid.

10. Upon completion of the Financial Evaluation, the Applicant's tender was found to be the lowest evaluated price at Kenya Shillings Ten Million, One Hundred Thirteen Thousand, Nine Hundred and Twenty-Four Only (Kshs. 10,113,924.00) and was recommended to proceed for due diligence pursuant to Section 83 of the Act.

Due Diligence

11. The Evaluation Committee was required to conduct due diligence on the best evaluated bidder to confirm qualification prior to award recommendation as set out under Stage 4: Post Qualification and Award Recommendation of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document. The scope of due diligence can be discerned from page 1 of 2 of the Due Diligence Report signed by



members of the Evaluation Committee on 28th May 2024 (hereinafter referred to as "the Due Diligence Report").

12. At the end of the due diligence exercise, the Evaluation Committee upheld its recommendation for award of the subject tender to the Applicant, being the lowest evaluated bidder at its tender price of Kenya Shillings Ten Million, One Hundred Thirteen Thousand, Nine Hundred and Twenty-Four Only (Kshs. 10,113,924.00)

Evaluation Committee's Recommendation

13. The Evaluation Committee recommended award of the tender to the Applicant herein at its tender price of Kenya Shillings Ten Million, One Hundred Thirteen Thousand, Nine Hundred and Twenty-Four Only (Kshs. 10,113,924.00) being the most responsive and lowest evaluated tender.

Professional Opinion

14. In a Professional Opinion, as an internal memo dated 4th June 2024, the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended as follows:

"

I, Amos Mwaighonyi Wanyelo Practitioner number K2196/2021 have gone through the tender process and the tender document for Lindum Systems Ltd as



recommended for the award by the Evaluation Committee and found out that He is a new entrant in this industry thus lacks capacity in terms of the resources both physical, financial and Human resources to meet the security needs of the Organization and in additions this, one tenderer M/s Chakra Company Limited financial proposal was ranked number five instead of position 3 as required. I hereby recommend the committee to re-evaluate the three lowest financial proposals earmarked for award and give a correct evaluation report.....”

15. Thereafter, Mr. Ashok Agrawal, the Accounting Officer of the Procuring Entity and the 1st Respondent herein, approved the Professional Opinion on 13th June 2024.

Request to Re-Evaluate the Subject Tender and Termination of the Procurement Process in the Subject Tender

16. Vide an Internal Memo dated 20th June 2024 addressed to the Chairman of the Evaluation Committee, the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi indicated that the Applicant’s tender failed to meet two key components of the evaluation criteria being the human resource and finance capacity and requested the Evaluation Committee to re-evaluate tenders ranking number 2 and 3 M/s Canon Security Kenya Limited and Chakra Company Limited with view of recommending an award.



17. *Vide* an Internal Memo dated 21st June 2024 addressed to the Ag. Manager Supply Chain Management and copied to the 1st Respondent and Evaluation Committee Members, the Chairperson of the Evaluation Committee, Mr. David K. Morogo declined the request for re-evaluation and indicated, *inter alia*, that the Evaluation Committee had accomplished its mandate based on the stipulated evaluation criteria and stood by the results and recommendations contained in both the Evaluation Report and Due Diligence Report.
18. Subsequently, *vide* an Internal Memo dated 26th June 2024 addressed to the 1st Respondent herein, the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi pointed out, *inter alia*, the disagreement between himself and the Evaluation Committee with regard to evaluation of the subject tender and recommended for the termination of the procurement process in the subject tender pursuant to Section 63(e) of the Act so as to allow re-tendering of the same.
19. Thereafter, Mr. Ashok Agrawal, the Accounting Officer of the Procuring Entity and the 1st Respondent herein, approved the recommendation for termination of the procurement process in the subject tender on 26th June 2024.

Notification to Tenderers

20. Tenderers were notified of termination of the procurement process in the subject tender *vide* an Internal Memo dated 7th July 2024 signed and sent

via email by the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi.

REQUEST FOR REVIEW NO. 85 OF 2024

21. On 30th August 2024, Lindum Systems Limited, the Applicant herein, filed a Request for Review dated 29th August 2024 together with an Applicant's Statement in Support of the Request for Review signed by Dennis Mbote Mumbi, its Managing Director and Shareholder on 29th August 2024 (hereinafter referred to as "the instant Request for Review") through NOW Advocates LLP seeking the following orders from the Board:

- a) The decision of the 1st Respondent terminating or cancelling the procurement proceedings for Tender No: ACFC/HR/02/2024/25-6 for Provision of Security Services for Agro Chemical and Food Company Limited be nullified and set aside in its entirety.***

- b) The decision of the 1st Respondent commencing and conducting the procurement process and/or proceedings of Tender No: ACFC/HR/02/2024/25-6 for Provision of Security Services (Re-advertisement) be nullified and set aside in its entirety.***



- c) ***The decision of the 1st Respondent determining the Applicant's bid unsuccessful and notifying the Applicant of the cancellation of the procurement proceedings of Tender No: ACFC/HR/02/2024/25-6 for Provision of Security Services for Agro Chemical and Food Company Limited as contained in the 1st Respondent's letter dated 27th August 2024 be nullified and set aside in its entirety.***
- d) ***The 1st Respondent be directed to proceed with the procurement proceedings of Tender No: ACFC/HR/02/2024/25-6 for Provision of Security Services post the Post Qualification and Award Recommendation stage to its logical conclusion including the making of an award to the successful bidder in line with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Asset Disposal Regulations, 2020 and the Tender Document, within fourteen (14) days from the date of the Decision of the Public Procurement Administrative Review Board.***
- e) ***To give effect to the orders of the Public Procurement Administrative Review Board herein, the 1st Respondent be directed to extend the tender***

validity of the subject tender with sixty (60) days from the date of its expiry.

f) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

g) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

22. In a Notification of Appeal and a letter dated 30th August 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 30th August 2024.



23. *Vide* a letter dated 5th September 2024, the Acting Board Secretary sent a reminder to the Respondents referring to the Notification of Appeal for the instant Request for Review dated 30th August 2024 and notified the Respondent of the provisions under Regulation 205(3) & (4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") with regard to the five (5) days within which it was required to submit a response being on or about 4th September 2024 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.
24. On 6th September 2024 the Respondents filed through the 1st Respondent a Management Response to the Request for Review Letter for Tender Ref: No. ACFC/HR/02/2024/25-6 Provision of Security Services together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
25. *Vide* email dated 6th September 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
26. *Vide* a Hearing Notice dated 6th September 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the



instant Request for Review slated for 11th September 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

27. On 10th September 2024, the Applicant filed through its advocates an Applicant's Further Statement in Support of the Request for Review signed by Dennis Mbote Mumbi and dated 9th September 2024, Written Submissions dated 10th September 2024 and an Applicant's List and Bundle of Authorities dated 10th September 2024.
28. At the hearing on 11th September 2024 at 11:00 a.m., the Board read out pleadings filed by parties in the instant Request for Review. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

29. The Applicant, led by Ms. Nungo relied on its documents filed before the Board and went on to submit that the instant Request for Review is in respect of the decisions of the 1st Respondent regarding the subject tender and the subject tender's re-advertisement.
30. Counsel submitted that the subject tender had 4 stages of evaluation being Preliminary, Technical, Financial and Post Qualification and that the Applicant succeeded in the first three stages and on post qualification, it received a call from the Procuring Entity on the 27th May 2024 seeking

directions to its offices for purposes of conducting due diligence. She further submitted that from the contents of the Procuring Entity's letter dated 27th August 2024 addressed to the Applicant and marked as Exhibit DM4, there was a clear indication that the matter had progressed to the due diligence stage provided under Stage 4: Post Qualification and Award Recommendation of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document which was to the effect that due diligence would be conducted on the best evaluated bidder being the Applicant herein. Counsel invited the Board to note that pursuant to Section 83 of the Act, due diligence is conducted on a bidder who submitted the lowest evaluated responsive tender and has been recommended for award.

31. She further invited the Board to note that even though the subject tender had been terminated pursuant to the provisions of Section 63 of the Act, all bidders in the subject tender save for the Applicant were notified of the said termination via an email sent on 17th July 2024 and from the said email's mailing list, it was clear that the Applicant was not among the bidders who were notified of the termination of the subject tender.

32. Ms. Nungo submitted that from the reasons advanced for cancellation of the subject tender it was stated that (a) the Applicant's bid failed to meet the capacity requirements, (b) the financial evaluation was not conducted properly leading to wrongful ranking of some bids, and (c) all the bids were rejected to create a fairground for all bidders.

33. She further submitted that there were three (3) fundamental breaches of the law by the Respondents with respect to the aforementioned turn of events in the subject tender. The first breach was that the Applicant's bid was determined unsuccessful at the post qualification and recommendation of award stage and the reasons advanced for its disqualification were outside and extraneous to the evaluation criteria set out under Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act.

34. Counsel submitted that the evaluation criteria did not expressly make a provision for the 56 guards referenced in the Procuring Entity's letter and the only criteria that relates to the management of staff was at the Technical Evaluation stage at pages 27 to 28 of the Tender Document which provided for four (4) personnel being one operations manager, one site manager and two supervisors. She argued that the requirement of 56 guards at page 71 of the Tender Document was part of the description of services under Part B and cannot be used to disqualify the Applicant having not been listed under Section III- Evaluation and Qualification Criteria of the Tender Document. Counsel invited the Board to appreciate that the Applicant met the set out pass mark of 70% at Technical Evaluation and progressed to the fourth stage of evaluation being the due diligence stage and any considerations that ought to have been given had already been given.



35. On the issue of ranking of bids at the Financial Evaluation stage as raised in the Procuring Entity's letter as a reason for cancellation of the subject tender, counsel submitted that that was irrelevant in view of the fact that the Applicant was properly ranked as the lowest evaluated bidder. It was her submission that that assertion was not in contest and as such, any wrongful ranking of other bidders at position three or five had no effect on the Applicant's ranking as it emerged as the lowest evaluated bidder and the Tender Document was specific that the successful bid at the Financial evaluation was the lowest bid.
36. In support of her argument, counsel relied on the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited (2018) eKLR* and *Republic v Public Procurement Administrative Review Board & 3 Others Ex parte Saracen Media Limited*.
37. Ms. Nungo submitted that the reasons advanced for termination of the subject tender were not proper reasons in view of Section 63 of the Act and invited the Board to note that none of the reasons under Section 63 of the Act were applicable to the circumstances in the instant Request for Review. Counsel further submitted that the Respondent did not specify any of the provisions under Section 63 of the Act relied upon in cancellation of the subject tender. She submitted further that the Respondent did not notify the Applicant of the termination nor the reasons for termination of the subject tender contrary to Section 63(4) of the Act. In support of her argument, she referred the Board to the holding



in Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) (2019) eKLR.

38. Counsel referred the Board to the Applicant's Exhibit marked DMM-6 being the re-advertised subject tender and submitted that the re-advertisement was improper as it was founded on an illegality and the Technical Evaluation Criteria therein was modified and introduced the requirement of 20 guards as part of the assignment and not the aforementioned 56 guards which is a clear demonstration that the Applicant was unfairly treated in the procurement process and there was no legal basis of terminating the subject tender nor justifying its disqualification.

39. She therefore urged the Board to allow the Request for Review as prayed.

Respondents' case

40. The Respondents, led by Mr. Owiti, relied on the documents that they filed before the Board, together with confidential documents concerning the subject tender. He submitted that the subject tender was for the year 2024/2025 and the Procuring Entity had budgeted for Kshs. 11.5 Million and as such, there was an adequate budget for the subject tender which was advertised on 4th April 2024 and closed on 24th April 2024 with 16 bidders having responded by submitting their bids which were evaluated



by the Evaluation Committee in the four stages provided in the Tender Document

41. Mr. Owiti submitted that the Head of Procurement plays a critical role in the procurement process being tasked with advising the accounting officer through a professional opinion and the accounting officer may opt to either approve or decline to approve the professional opinion rendered.
42. He further submitted that the aim of the due diligence exercise in the procurement process is to establish if the bidder has capacity to undertake the task and the main focus of the due diligence exercise is with regard to the HR capacity and the financial capacity of the bidder.
43. He indicated that when a procuring entity visits a bidder for the purpose of carrying out the due diligence exercise, it is not bound to award the tender to the said bidder since such a bidder is awarded if it qualifies in the due diligence exercise and where an issue arises, the procuring entity considers the second lowest evaluated bidder.
44. Mr. Owiti submitted that as an accounting officer, he received a report from the Head of Supply Chain which raised three fundamental issues being (a) wrongful ranking of bids whereby bidder no. 5 was given a figure that had added VAT and was not consistent with the tender opening minutes and if this was corrected, it would have been ranked as number 3, (b) that the Head of Supply Chain went through the documentation and realized that the Applicant had a bias in other areas

of security as opposed to guarding services and in guarding services, its highest client had about 9 guards on any single day and the Procuring Entity required 56 guards as provided at page 71 of the Tender Document which was the basis of the pricing of the subject tender and that that was not a condition being introduced to the subject tender, and (c) the financial capacity of the Applicant.

45. Mr. Owiti referred the Board to the Applicant's Audited Financial Statements for year 2020, 2021, and 2023 submitted in its bid document and argued that at page 2 of the 2020 Financial Statements being the Board of Director's report, the surplus after tax was provided at Kshs. 6,070,000/- while the same accounts at page 7 provided the net surplus for the year 2020 at Kshs. 74,000,000/-. He further argued that from the 2021 accounts, the balance sheet did not balance having indicated the total assets at page 8 as Kshs. 160 Million while total liabilities at Kshs. 39 Million and as such, there was an issue of establishing the financial capacity of the Applicant.

46. He pointed to the cash and bank balances in the Applicants submitted accounts for the years 2020, 2021, and 2022 and argued that in 2020, the Applicant had a cash and bank balance of Kshs. 184,000/- with no bank overdraft or loan and in 2021, it had cash and bank equivalents of Kshs. 147,739/- with no loan or bank overdraft and even though the Applicant presented a letter from the bank indicating that it can qualify for a loan or bank overdraft, from the face of its accounts, the Respondents did not see proof of financial capacity.



47. He further argued that the Applicant's turnover for the year 2020 was Kshs. 143 Million while in 2021 it was at Kshs. 65.8 Million and from the notes in the 2021 accounts, it indicated that sales amounted to Kshs. 176 Million which was inconsistent with the sales declared in its books of accounts.
48. Mr. Owiti submitted that on the basis of the Applicant's human resource capacity and financial capacity, the Head of Supply Chain Management advised that the Evaluation Committee should look at the 2nd and 3rd ranked bidders for due diligence but the Evaluation Committee did not manage to do so and the final advice from the Head of Procurement was to cancel the subject tender.
49. Mr. Owiti further submitted that the subject tender was cancelled for fair play of all bidders, negative results of the due diligence exercise and governance issue relating to evaluation and re-evaluation of the subject tender that the Respondents were not able to deal with. He indicated that the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") was notified of the cancellation and only 3 bidders were inadvertently not notified of the said cancellation from the email sent out to bidders and when the Applicant herein requested to be supplied with information, the Procuring Entity apologized and wrote a letter indicating that there was a miscommunication.

50. He indicated that upon cancellation of the subject tender, it was re-advertised so as to have fair play and to get the right winner, the Applicant participated in the re-advertised tender and its bid is under consideration which is an indication that he has confidence in the procurement process. He further indicated that the evaluation criteria in the re-advertised subject tender was the same and that the Procuring Entity entrenched the experience requiring a bidder to have a minimum number of guards which proves a bidder's capacity to handle the task and this would be scored depending on the number of guards a bidder had. It was his submission that that was not discriminatory since a bidder would be ranked based on its technical capacity.
51. He reiterated that the Respondents adhered to the Act and Regulations and that the Applicant was treated fairly in the procurement process in the subject tender.
52. At that juncture, Mr. Amos Mwaighonyi submitted that in preparing his Professional Opinion upon receipt of the Evaluation Report, he noted that there were anomalies as highlighted hereinabove and that he advised the Evaluation Committee to repeat the evaluation process through the 1st Respondent but the Evaluation Committee refused to do so.
53. He urged the Board to uphold the decision of the Procuring Entity and dismiss the Request for Review with costs.

Applicant's Rejoinder

54. In a rejoinder, Ms. Nungo submitted that the 1st Respondent's extensive submissions were in such a manner likely to suggest that he undertook an evaluation of the subject tender and invited the Board to consider the role of the Evaluation Committee as set out in Section 80 of the Act vis-à-vis the role of the Head of Procurement set out in Section 84 of the Act.
55. She argued that the law enables a team of persons to seat and evaluate a tender for purposes of integrity of the procurement process and it would be absurd that after a team of evaluators had evaluated and reached a decision, an individual would come up and question the same particular process.
56. Counsel submitted that the professional opinion as stipulated under Section 84 of the Act gives guidance in the event that there is a dissenting opinion among members of the Evaluation Committee and that it had not been stated that there was any dissenting position by a member of the Evaluation Committee.
57. Counsel pointed out that the reasons advanced in the Respondents submissions pertaining to the Applicant's Audited Accounts were not set out in its letter issued to the Applicant which only highlighted the issue of ranking with regard to the financial issues enumerated therein and as such, that argument could not be introduced at that stage of the proceedings. She further pointed out that the Evaluation Committee

undertook its work and prepared an Evaluation Report which ought to have guided the procurement process and the Professional Opinion should only have been considered in the event that it pointed out that there was a dissenting position.

58. Counsel submitted that the fact that the Applicant participated in the re-advertised subject tender does not take away its right to challenge the subject tender and any illegalities could not be sanctioned by the Applicant's participation in the re-advertised tender.

59. On the changes incorporated in the evaluation criteria of the re-advertised subject tender, Ms. Nungo submitted that that was an admission by the Respondents that what was intended to be gotten from the evaluation criteria in the first tender was omitted and was now being sneaked into the subsequent tender yet from the onset, that was not a basis for the set out evaluation criteria in the Tender Document.

60. She urged the Board to allow the Request for Review as prayed.

CLARIFICATIONS

61. With regard to how the Applicant came to learn that the subject tender had been terminated, Ms. Nungo submitted that the Applicant learnt of the termination of the subject tender through the letter dated 27th August 2024 annexed as Exhibit marked DMM-4 wherein the position of cancellation was communicated.

62. On whether the Applicant's tender was evaluated at the fourth stage of the evaluation process being the post qualification stage, counsel confirmed that the Applicant was evaluated at the fourth stage of evaluation and pointed to paragraph 6 of the Applicant's Statement in Support of the Request for Review where it indicated that it received a call on the 27th May 2024 from the Procuring Entity seeking directions to its offices for purposes of conducting due diligence which was conducted on the same day of 27th May 2024.
63. She indicated that the Applicant's submitted tender price of Kshs. 10,113,924.00 per annum was the lowest evaluated price despite the alleged misranking that affected the bidder disclosed as Chakra Company Limited whose price was above the Applicant's price. Counsel further indicated that the call by the Procuring Entity with regard to the due diligence was received by Dennis Mbote Mumbi and that the call was made by a gentleman who introduced himself as Mr. Karani and that a team visited her client's office and proceeded with the due diligence exercise.
64. When asked to clarify to the Board the significant differences between the subject tender and the re-advertised tender, Ms. Nungo submitted that from Section III – Evaluation and Qualification Criteria of the Tender Document, (a) the first tender document under Stage 1 Preliminary Evaluation had 19 mandatory requirements while the re-advertised tender had 21 mandatory requirements, (b) the first tender document

under Stage 2 Technical Evaluation requirement no. 2 required a bidder to provide evidence of at least 3 projects handled in the past 3 years (2020 to 2022) and had provided specifications of what would constitute the weighting score while the re-advertised tender retained this requirement but added that above an average of 20 guards per assignment, maximum marks would be allocated and between 0 and 19 guards, an average of 50% of the marks would be allocated. She indicated that these changes in the evaluation criteria formed the basis of why the Applicant was before the Board noting that the evaluation criteria in the first tender had been met and what was stipulated in the re-advertised tender was outside what had been earlier on the set under the evaluation criteria in the Tender Document of the subject tender.

65. When asked to point out to the Board the stage at which the requirements pertaining to the Applicant's human resource capacity and financial capacity were provided under the evaluation criteria in the Tender Document, Mr. Owiti submitted that the evaluation criteria spoke of years of experience and the number of projects handled by a bidder, its financial capacity and whether it had a letter of credit which was more of a desktop review hence the need to conduct the due diligence exercise so as to establish whether what was provided in response to the evaluation criteria tallies with what is on the ground.

66. When asked to expound on how the scoring was to be effected with regard to the requirement for the number of guards a bidder has in view of the technical capacity requirement in the evaluation criteria at page 27

of the Tender Document in the subject tender, Mr. Amos Mwaighonyi made an attempt to point the Board to requirement no. 2 under Stage 2: Technical Evaluation at page 27 of the Tender Document requiring a bidder to submit reference letters on client's letterhead including contact persons' details and indicated that this was what guided him in reaching his opinion that the number of guards in the Applicant's bid were not meeting the said requirement.

67. He further conceded that there was no weighting score for the alleged requirement for a bidder to provide 56 guards at the Technical Evaluation stage and as such, it was not an evaluation criterion under Section III- Evaluation and Qualification Criteria of the Tender Document.

68. Upon enquiry by the Board on what was the position of the Evaluation Committee as per the Evaluation Report and Due Diligence Report provided with regard to the issues raised by the Respondents pertaining to the Applicant's financial capacity and human resource capacity, Mr. Owiti submitted that the Due Diligence Report did not address the issue of the Applicant's 2 years audited accounts provided under item no. 1 of T4 Financial Capacity at page 28 of the Tender Document yet the Evaluation Committee was expected to obtain the originals at the site visit.

69. With regard to parameter no. 9 at page 2 of 2 of the Due Diligence Report indicating that the Applicant received a positive feedback on the ICPAK Auditor Online Check, Mr. Owiti submitted that the said parameter

was not well explained since it did not expound on whether the firm or accounts were in good standing.

70. Mr. Owiti submitted that the Respondents were not satisfied with the Evaluation Committee's outcome in evaluation of the subject tender since it was a requirement under the evaluation criteria for a bidder to submit 2 years audited accounts and the first point of reference for the Evaluation Committee ought to have been getting the Applicant's original audited accounts so as to compare with what was submitted in its bid document.

71. On whether the Applicant's submitted audited accounts were signed by a competent auditor and at what stage they were evaluated, Mr. Owiti submitted that the detailed look at the Applicant's accounts came in at the due diligence stage where it was observed that there were discrepancies and the said accounts were signed by the auditor though he was not in a position to comment on the competency of the said auditor.

72. He further submitted that there was no need for the Respondents, in their termination letter, to go into the specific issues under the reason for termination given to bidders pertaining to financial capacity and this was only being raised by the Respondents due to the instant Request for Review which led the Respondents to take a deeper look at its books of accounts which was not looked at earlier. Mr. Owiti indicated that he was only representing the 1st Respondent in these proceedings and that it was

the 1st Respondent who finalized the report laying out the issues enumerated in these proceedings.

73. When asked to expound on the basis of the recommendation for the due diligence exercise to be conducted on the other two bidders and if the same was carried out, Mr. Owiti submitted that where there is a negative outcome upon conduct of the due diligence exercise of a bidder, the procuring entity moves on to the second lowest evaluated bidder and if it still gets a negative result, it moves on to the third lowest evaluated bidder as provided under the Act and this was what guided the Respondents in requesting the Evaluation Committee to conduct due diligence on the two bidders and if this had been properly done, the matter would not have come up for review.

74. He clarified that only the Applicant's tender underwent the vigorous check of its audited accounts since it was the bidder recommended for award of the subject tender by the Evaluation Committee.

75. On the issue of what the Respondents meant by indicating that the reason for termination of the subject tender was due to detection of material governance issues and if there were allegations of detection of material governance issues and compromise of the procurement process in the subject tender, Mr. Owiti submitted that it was unfortunate that the Evaluation Committee refused to change its position and carry out the due diligence exercise as requested putting the 1st Respondent in an awkward position and resulting to what the Respondents termed as the

main material governance issue in the subject tender that lead to its cancellation.

76. Mr. Owiti submitted that it is the role of the Evaluation Committee to recommend award of the subject tender but it is the role of the accounting officer to issue award of the subject tender to the successful bidder and if the accounting officer declines to award, he indicates his reasons for refusal in line with the advice issued in the profession opinion. He reiterated that the mere recommendation for award is not an award in itself hence the need for conducting post-qualification on the recommended bidder.

77. On his part, Mr. Amos Mwaighonyi submitted that his role as the Procurement Manager was to be the secretariat and if he was not available to attend an evaluation, he delegates and in the instant case, he delegated and was represented in evaluation of the subject tender. He further indicated that it is his role to receive the Evaluation Report so that he can prepare an independent professional opinion and in this case, he went through the documents and discovered the capacity issues and anomalies raised with regard to the Applicant's bid leading him to differ from the Evaluation Committee's Report which was presented together with the Due Diligence Report but upon raising the said issues with the chair of the Evaluation Committee, the Evaluation Committee refused to re-evaluate as requested. He clarified that the reason for termination of the subject tender was due to the issues of the Applicant's capacity



discovered at the point of preparing the Professional Opinion and there was no malice on his end in the procurement process.

78. Upon enquiry by the Board on whether the anomalies alleged to have been discovered by the Respondents with regard to the Applicant's tender could be termed as introduction of an extrinsic evaluation criteria at the post qualification stage, Mr. Owiti submitted that due diligence is meant to confirm what had been evaluated and that that is confirmed by checking submitted documents. He further submitted that the Evaluation Committee while conducting the due diligence exercise ought to have discovered and known that the Applicant's accounts were mixed up, ought to have visited a few of the Applicant's sites so as to establish if it had capacity and this was well provided for under the evaluation criteria and was not being introduced as new criteria.
79. When asked to clarify to the Board the three (3) bidders that were not notified of the cancellation of the subject tender, and the reason why they weren't notified, Mr. Amos Mwaighonyi submitted that the excluded bidders were Canon Security Kenya Limited, Surveillance Kenya Limited and the Applicant herein which he conceded was an inadvertent mistake.
80. When asked to point out if a report was filed with the Director General PPRA as stipulated under Section 63 of the Act with regard to termination of the subject tender, Mr. Amos Mwaighonyi submitted that the report was submitted to PPRA vide a letter dated 7th July 2024 where the reasons for termination of the subject tender were laid out.

81. Upon enquiry by the Board on whether there was a dissenting opinion in the Evaluation Report and the recommendations that were issued by the Evaluation Committee in the subject tender, Mr. Owiti submitted that there was no dissenting opinion in the Evaluation Report as submitted by the Evaluation Committee.

82. When asked to explain the stage at which the Head of Procurement unilaterally disqualified the Applicant and requested the Evaluation Committee to re-evaluate the two specific bidders indicated in his Internal Memo dated 20th June 2024, Mr. Amos Mwaighonyi conceded that he did inform the Chair of the Evaluation Committee to re-evaluate the bidders ranking no. 2 and 3 but in his Professional Opinion to the 1st Respondent, he advised for the three lowest bidders to be re-evaluated under the assumption that the Applicant being no. 1 had been evaluated and as such, he wanted the detailed evaluation of the capacities of bidders ranked no. 2 and 3 so as to come to an informed decision of the three bidders for consideration by the 1st Respondent in award of the subject tender.

83. Mr. Owiti conceded that the law requires for the lowest evaluated bidder to be disqualified first before proceeding with carrying out due diligence on the second lowest evaluated bidder.

84. When asked to clarify to the Board the motive behind the amendments and changes made to the Tender Document pertaining the re-advertised

subject tender, Mr. Owiti submitted that the changes provided more clarity in the evaluation criteria in terms of experience requirement in the re-advertised subject tender and that that being a new tender, it would now be clear to bidders on the kind of experience required by the Procuring Entity which was free to make those amendments to the new tender document and for bidders to add their input.

85. When asked to clarify on who terminated the procurement proceedings in the subject tender, Mr. Amos Mwaighonyi submitted that the subject tender was cancelled by the Accounting Officer through the Head of Supply Chain who had been issued with an approval to do so as seen by Exhibit marked X being an Internal Memo dated 26th June 2024 that was enough proof of delegated authority to proceed with cancellation of the procurement proceedings in the subject tender.

86. Mr. Owiti further submitted that it was the sole prerogative of the 1st Respondent as provided under Section 63 of the Act to terminate the procurement proceedings in the subject tender and that the 1st Respondent ought to have communicated to bidders the termination of the procurement proceedings in the subject tender.

87. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 30th August 2024 was due to expire on 20th September 2024 and that the Board would communicate its decision on or before 20th September 2024 to all parties to the Request for Review via email.

88. On 16th September 2024 the Respondents filed, without leave of the Board and after conclusion of hearing of the instant Request for Review, an Addendum 1. For Management Response Reference Number: ACFC/RD & CE/P.10/2024 dated 3rd September 2024 for the Procurement Proceeding Review Request Made by M/S Lindum Systems Ltd for Tender Reference Number: ACFC/HR/02/2024/25-6: Provision of Security Services to Agro Chemical and Food Company Limited.

BOARD'S DECISION

89. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board shall make a determination on whether the procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?

Depending on the determination of the first issue

B. Whether the Applicant's tender submitted in the subject tender was unfairly, unlawfully and illegally disqualified contrary to the provisions of the Tender Document as

read with Section 80(2) of the Act and Article 227(1) of the Constitution.

C. What orders should the Board grant in the circumstances?

90. Before delving into the issues framed for determination, we note from the Board's file that after conclusion of the online hearing on 11th September 2024, the Respondents filed on 16th September 2024 an Addendum 1. For Management Response Reference Number: ACFC/RD & CE/P.10/2024 Dated 3rd September 2024 for the Procurement Proceeding Review Request Made by M/S Lindum Systems Ltd for Tender Reference Number: ACFC/HR/02/2024/25-6: Provision of Security Services to Agro Chemical and Food Company Limited (hereinafter referred to as "the Respondents' Further Response").

91. It is imperative to note that Regulation 205 of Regulations 2020 requires an accounting officer to file a response to a request for review within 5 days of notification by the Board Secretary of the Request for Review. The Respondents herein were notified of the instant Request for Review by the Ag. Board Secretary, Mr. James Kilaka, vide a Notification of Appeal and a letter dated 30th August 2024 and had until 5th September 2024 to file their responses to the instant Request for Review.

92. On 6th September 2024 the Respondents filed through the 1st Respondent a Management Response to the Request for Review Letter

for Tender Ref: No. ACFC/HR/02/2024/25-6 Provision of Security Services together with confidential documents submitted pursuant to Section 67(3)(e) of the Act to which the Applicant responded by filing on 10th September 2024 a Further Statement in Support of the Request for Review, its Written Submissions and List and Bundle of Authorities. The matter was set down for hearing on 11th September 2024 where all parties confirmed to the Board pleadings filed and as such, parties proceeded to highlight their respective cases and at the conclusion of the hearing, the Board indicated that it would issue its decision in the matter on or before the 20th September 2024.

93. In view of the foregoing, it is our considered view that the Respondents' Further Response has been filed out of time and without leave of this Board, consideration of the same by the Board would not only be a flagrant disregard of Regulation 205 on close of pleadings but would also be extremely prejudicial to the Applicant as it will not have been afforded a chance to respond to the issues raised therein and as such, the same is for striking out. In finding so, we are guided by the holding in **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs. Francis Bahati Diwani & 2 others(2014) eKLR**, whereby the High Court in this regard noted:

"Striking out of a pleading, especially where the Rule does not expressly provide so, which has been filed out of time is an extreme measure which is resulted to in the



clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court."

94. In the circumstances, the Respondents' Further Response filed on 16th September 2024 is hereby struck out for being filed out of time and by extension an abuse of this Board's process having been filed after the Board had retired to write the decision in this matter.

Whether the Board has jurisdiction to hear and determine the instant Request for Review

95. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

96. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

97. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

98. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction

exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

99. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

“Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

100. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

101. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

102. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

103. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

104. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

***"(1) The functions of the Review Board shall be—
(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

105. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

106. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

**PART XV — ADMINISTRATIVE REVIEW OF
PROCUREMENT AND DISPOSAL PROCEEDINGS**

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection

(1)—

(a) the choice of a procurement method;

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act;
and**

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

173. Powers of Review Board



Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

107. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Sections 172 and 173 of the Act which donate powers to the Board with respect to an administrative review of procurement proceedings before the Board. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty

imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

As to whether the procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?

108. The Applicant in the instant Request for Review is aggrieved by the decision of the 1st Respondent to terminate the procurement proceedings in the subject tender as communicated to it in the letter dated 27th August 2024 which reads:

".....

RE: PROCUREMENT PROCEEDING IRREGULARITIES

We acknowledge receipt of your letter Ref: CLT/ACFCL/TRPSS/DM dated 22nd August, 2024 on the above underlined subject regarding tender Ref: ACFC/HR/02/2024/5-6 on provision of security services which had its tender process cancelled. All the concerns raised in the letter have been noted by the Management.

The Management has addressed your concerns as follows:

- 1. Pursuant to section 63(4) the tender cancellation was communicated to both PPRA and all***



participants. Unfortunately, from the list your name was missing inadvertently.

We are sorry for that.

The reasons for cancellation were two-fold:

a) Failure to meet capacity requirements as stipulated in our invitation tender document in the scope page 71, description of services section (B). We found that your capacity from your clientele references in your tender was very low compared to ACFC capacity of 56 guards.

b) Financial evaluation was not done properly as such some bidders were wrongly ranked in the financial evaluation.

2. Yes we agree with you that the post-qualification process was conducted for your company, but this process does not always guarantee an award and further to this kindly read section 40 (40.1) page 21 of our invitation to tender document which clearly stipulates that "the procurement entity reserves the right to accept or reject any or all tenders", and this is the case with this tender. We rejected all tenders to create a fair ground for competition for all tenderers.

3. Communication email for tender cancellation will be forwarded together with this letter. Hard copy of this letter will be sent through your postal address.

Please note that Agro Chemical and Food Company Limited is a reputable company, as such all its procurement processes are conducted in an open, fair, and transparent manner in line with the PPAD Act 2015 and its subsequent regulations 2020.

We look forward to your participation and further engagement in our future tenders.....”

109. From the contents of the above letter, the reasons adduced by the Respondents for termination of the procurement proceedings in the subject tender were that (a) the Applicant failed to meet the capacity requirements stipulated in the scope at page 71 of the Tender Document having submitted in its clientele references a low capacity compared to the Procuring Entity's capacity of 56 guards, (b) the financial evaluation was improperly conducted as some bidders were wrongly ranked, (c) the Respondents reserved the right to accept or reject any or all bids and as such rejected all the bids in the subject tender so as to create a fair ground for competition for all bidders.

110. It is the Applicant's case that cancellation of the procurement proceedings of the subject tender was carried out contrary to Section 63 of the Act read with Regulation 48 of Regulations 2020 and was therefore illegal, unlawful, null and void. As a consequence therefore, the

Respondents had no legal basis to commence and conduct a re-advertisement of the subject tender seeking bidders to submit bids for the same service that forms the substratum of the subject tender.

111. On the other hand, it is the Respondents' case that cancellation of the procurement proceedings in the subject tender was done pursuant to Section 63 (d) & (e) of the Act following detection of material governance issues in the Evaluation Report submitted by the Evaluation Committee, and that they followed the due process provided under the Act and Regulations 2020 in cancellation of the procurement proceedings in the subject tender; thus the subsequent re-advertisement of Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services (Re-advertisement) (herein referred to as "the re-advertised subject tender").

112. The question that this Board is now called to answer is whether the termination of the procurement proceedings in the subject tender was done in accordance with the law.

113. Termination of procurement proceedings is governed by Section 63 of the Act. It is imperative to note that when a termination of procurement and asset disposal proceedings meets the threshold provided under Section 63 of the Act, the jurisdiction of this Board is ousted by virtue of Section 167 (4) (b) of the Act which provides as follows: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a)

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act

(c)....." [Emphasis by the Board]

114. Superior Courts in this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."



In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

115. The High Court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

116. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request

for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

117. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 29 of 2023 Craft Silicon Limited**



v Accounting Officer Kilifi County Government & another; and PPARB Application No. 5 of 2024 Seluk Investments Limited v The Accounting Officer/Chief Officer Department of Urban Development County Government of Machakos & Another wherein the Board took the position that its jurisdiction can only be ousted if termination of procurement proceedings was done in accordance with Section 63 of the Act.

118. Drawing from the aforementioned judicial pronouncements, this Board will first interrogate the termination of the procurement proceedings of the subject tender to establish whether the said termination was conducted in accordance with the requirements set out under Section 63 of the Act. It is only upon satisfying itself that the said requirements were met that the Board can down its tools in the matter. However, where any requirement was not met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

119. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

120. Further, Regulation 48 of Regulations 2020 provides:

"(1) Prior to the cancellation or termination of a procurement and asset disposal proceedings under section 63 of the Act, an accounting officer may take into account the recommendations of the head of procurement function.

(2) The report required under section 63(2) and (3) of the Act shall be made in accordance with the guidelines issued by the Authority."

121. In essence, whether there are valid substantive reasons for the termination of procurement proceedings prior to award of a tender is **a question of fact** that must be made out by sufficient evidence, the onus whereof is on the procuring entity which must show that any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender to wit; an accounting officer is required to give PPRA a written report on the termination with reasons and notify all bidders in writing of the termination with reasons within fourteen (14) days of termination.

122. In a nutshell, for termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

With regard to the substantive requirements for termination of procurement proceedings in the subject tender;

123. At paragraph 2.0 of the Respondents' Management Response to the Request for Review Letter for Tender Ref: No. ACFC/HR/02/2024/25-6 Provision of Security Services dated 3rd September 2024 and filed on 6th September 2024 (hereinafter referred to as "the Respondents' Response"), the Respondents contend that cancellation of the procurement proceedings in the subject tender was approved by the 1st Respondent on 26th June 2024 and that the reasons for cancellation of the procurement proceedings in the subject tender were as follows:

a) wrong positioning of the financial proposals. For example one of the bidders with a financial proposal of Kshs.10,763,280.00 M/s.Chakra company Limited was ranked position 5 with Kshs.12,485,404.80 instead of the correct position three scored with correct amount of Kshs.10,763,280.00. Financial ranking extract as summarised by the Committee and the corrected.



b) The tenderer earmarked for award lacks human resource capacity in the number of guards required to meet the requirement of the company (Agro Chemical and Food Company Limited) since the References provided by the bidder shows inadequacy in meeting the requirements as stated above

c) The committee [sic] complete refusal to re-evaluate the tenders as requested by the accounting officer.

124. In essence, the four (4) reasons adduced for cancellation of the procurement proceedings in the subject tender were that (a) there was wrongful positioning of the bidder's financial proposals in terms of ranking at the Financial Evaluation stage, (b) the tenderer earmarked for award of the subject tender, being the Applicant herein, lacked human resource capacity in the number of guards required by the Procuring Entity as seen from its references provided in its bid document, and (c) the Evaluation Committee's refusal to re-evaluate tenders as requested by the 1st Respondent.

125. We note from the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act that the Procuring Entity invited bidders on 4th April 2024 to submit bids in response to Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services for Agro Chemical and Food Company Limited which attracted a total of sixteen (16) bidders including the Applicant herein. Tenders were

opened on 24th April 2024 and evaluation of the said tenders undertaken in four (4) stages being the preliminary evaluation, technical evaluation, financial evaluation and post qualification. At the conclusion of the Financial Evaluation, the Applicant's bid emerged as the most responsive and lowest evaluated tender and was subsequently referred by the Evaluation Committee for a post qualification in line with the provisions under Section 83 of the Act. Being satisfied with the results of the post qualification exercise, the Evaluation Committee recommended award of the subject tender to the Applicant at its tender sum of Kenya Shillings Ten Million, One Hundred Thirteen Thousand, Nine Hundred and Twenty-Four Only (Kshs. 10,113,924.00).

126. However, in a Professional Opinion dated 4th June 2024 prepared and signed by the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi and addressed to the Resident Director and Chief Executive Officer of the Procuring Entity and the 1st Respondent herein, Mr. Mwaighonyi did not concur with the Evaluation Committee's recommendation to award the subject tender to the Applicant and instead issued a recommendation for the Evaluation Committee to re-evaluate the three lowest financial proposals earmarked for award and give a correct evaluation report. The Professional Opinion reads in part as follows:

".....
I, Amos Mwaighonyi Wanyelo Practitioner number K2196/2021 have gone through the tender process and the tender document for Lindum Systems Ltd as



recommended for the award by the Evaluation Committee and found out that He is a new entrant in this industry thus lacks capacity in terms of the resources both physical, financial and Human resources to meet the security needs of the Organization and in additions this, one tenderer M/s Chakra Company Limited financial proposal was ranked number five instead of position 3 as required. I hereby recommend the committee to re-evaluate the three lowest financial proposals earmarked for award and give a correct evaluation report....."

127. Subsequently, the above recommendation was approved by the 1st Respondent on 13th June 2024 as follows:

"In view of valid points raised by Actg Mgr (SC) I also feel that Committee needs to relook and review."

128. On this basis, the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi vide an Internal Memo dated 20th June 2024 addressed to the Chairman of the Evaluation Committee in the subject tender proceeded to instruct the Evaluation Committee to re-evaluate the subject tender as follows:

"....."

RE: RE-EVALUATION OF TENDERS FOR PROVISION OF SECURITY SERVICES



You are aware that the Tenderer recommended for award M/s Lindus Systems Limited failed to meet two key major component of supplier evaluation criteria, that is both human resource and financial capacity and therefore through the approval/instruction of Accounting Officer (Resident Director & Chief Executive), Tenderer's ranking number two and three M/s Canon Security Kenya Limited and Chakra Company Limited respectively be re-evaluated for the award. It is in view of the foregoing that your team is requested to meet and evaluate the two tenderers for the sole purpose of the award.

....."

129. The Chairman of the Evaluation Committee in the subject tender proceeded to issue an Internal Memo dated 21st June 2024 in response to the above Memo as follows:

RE: RE-EVALUATION OF TENDERS FOR PROVISION OF SECURITY SERVICES

This is in response to your memo ref: AG. MSCM/101/2024 DATED June 20,2024.

We find the object of the memo unfounded as the team accomplished their mandate based on the evaluation criteria as was provided in the tender document and within the provisions of the Act.



The bidder declared successful in line with Sec. 86(1)(a) of the Act met all the qualification requirements during evaluation, and the same was confirmed through site visit. Except if there was another committee handling the same assignment contrary to Sec. 46(4)(d) of the Act, we request you to refer to the evaluation and due diligence reports that we handed over to you earlier.

Further, bidders ranked no. 2 & 3 in our evaluation are M/s Canon Security Kenya Limited and M/s. Pride Kings Services Limited respectively and not M/s Chakra Company Limited as indicated in your memo. Although we ranked M/s Chakra Company Limited No. 6, he had an arithmetic error in his bid which if handled in line with ITT. 32.2(b) of the tender document and Reg. 74(2) he would be disqualified. The same is to be communicated to the bidder during notification of award in line with ITT. 32.3 of the tender document.

Finally, we stand by the results as contained in both the evaluation and due diligence reports as that is what we can defend. You may consider a review by the PPARB for a neutral opinion on the evaluation outcome as provided for in law.

....."



130. Upon receipt of the above response by the Chairman of the Evaluation Committee, the Ag. Manager Supply Chain Management, Mr. Amos Mwaighonyi vide an Internal Memo dated 26th June 2024 addressed to the 1st Respondent proceeded to recommend for cancellation of the procurement proceedings in the subject tender as follows:

".....

RE: CANCELLATION OF TENDER PROCESS FOR TENDER REFERENCE NUMBER ACFC/HR/02/2024/5 PROVISION OF SECURITY SERVICES

Following my memo dated 20th June 2024 to the chairman evaluation committee for the above-mentioned tender requesting for re-evaluation of the first three bidders recommended for award after founding some anomalies in their evaluation report on ranking of financial proposals and lack of capacity in human resources on the vendor recommended for award M/s Lindum Systems Limited. M.s Chakra Company Limited quoted Kshs. 10,763,280.00 tax inclusive was ranked number five (5) at Kshs. 12,485,404.80 instead of the correct position of number three (3) at Kshs. 10,763,280.00. While M/s Lindum Systems Limited recommended for award lacked human resource capacity having only a maximum of 9 guards per day to one the customers compared to Agro Chemical & Food Company requirement of 56 guards per day in all their



client references. The memo is attached for your reference

Due to this disagreement, I in my capacity as the Acting head of supply chain management, recommend the cancellation of the whole tender process to allow re-tendering for this service. This is pursuant to section 63(e) of the Act 2015 on material governance issues detected as explained above. Therefore, this memo is forwarded for your approval if in order.

Amos Mwaighonyi

(signed)

Ag. Manager, Supply Chain Management

RD & CE COMMENTS

Approval(✓)/disapproval(X)

Signature: (signed) Date: 26th June 2024.

131. Following approval by the 1st Respondent of the recommendation made by Mr. Mwaighonyi to terminate the procurement proceedings in the subject tender, Mr. Mwaighonyi proceeded to notify bidders of termination of the procurement proceedings of the subject tender via email of 17th July 2024 where he attached an Internal Memo dated 7th July 2024 addressed to all the tenderers in the subject tender which reads as follows:

"



RE: CANCELLATION OF TENDER PROCESS FOR TENDER REFERENCE NUMBER ACFC/HR/02/2024/5 PROVISION OF SECURITY SERVICES

This cancellation is pursuant to section 63(d)(e) of the Public Procurement Asset Disposal Act 2015 where material governance issues were detected in the evaluation report submitted to my office by the tender Evaluation Committee.

Reasons for cancellation

1. Improper evaluation of the tenders resulting to wrong positioning of financial proposals. For example, one tenderer was ranked number five instead of the correct position of number three.

2. The tenderer earmarked for award by the committee lacked human resource capacity to meet Agro Chemical and Food Company service requirements.

The accounting officer wrote to the evaluation committee requesting for re-evaluation of the tenders, but the committee maintained that their report was correct and final despite the glaring anomalies. Their refusal for re-evaluation brought the whole process to a dead end. The management sat down and resolved that this tender be cancelled and be re-advertised for everybody to get fair ground for competition and get the rightful bidder for award.



Thank you for your participation and I look forward to your full participation when this tender is re-advertised.

(signed)

Amos Mwaighonyi

AG. MANAGER, SUPPLY CHAIN MANAGEMENT

132. From the foregoing, we understand the Respondents' submission in the instant Request for Review as to termination of the procurement proceedings of the subject tender to be that:

- i A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of 16 bids submitted in the subject tender, it proceeded to carry out a post qualification on the Applicant and recommended the Applicant for award of the subject tender since it emerged as the most responsive and lowest evaluated bidder and had passed the due diligence exercise.
- ii An Evaluation Report and Due Diligence Report were prepared and submitted by the Evaluation Committee through its Chair to Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management.
- iii Mr. Mwaighonyi proceeded to prepare a Professional Opinion wherein:



- a) he stated that he went through the tender process and the tender document submitted by the Applicant;
 - b) he found out that the Applicant is a new entrant in the industry thus lacked capacity in terms of resources specifically physical, financial and human to meet the security needs of the Procuring Entity; and
 - c) he also found out that the bidder by the name Chakra Company Limited had been ranked number 5 instead of 3 at the Financial Evaluation.
- iv In conclusion, Mr. Mwaighonyi recommended in his Professional Opinion for the Evaluation Committee to re-evaluate the 3 lowest financial proposals earmarked for award and give a correct evaluation report which recommendation was approved by the 1st Respondent leading Mr. Mwaighonyi to inform the Chairman of the Evaluation Committee vide Memo dated 20th July 2024 that the Applicant had failed on two key components of the evaluation criteria and the Evaluation Committee was therefore under instructions by the 1st Respondent to re-evaluate Tenderer No. 2 and 3 (Canon Security Kenya Limited and Chakra Company Limited) for the sole purpose of award of the subject tender.



- v However, in an interesting twist of events, the Evaluation Committee was adamant that evaluation of the subject tender was satisfactory and it stood by the results of the evaluation process contained in both the Evaluation Report and the Due Diligence Report and clarified that in any event, from the ranking of bids at Financial Evaluation, bidders No. 2 and 3 were Canon Security Kenya Limited and Pride Kings Services Limited respectively and not the said Chakra Company Limited as indicated.
- vi The discord between the Evaluation Committee and Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management led to his recommendation to the 1st Respondent to terminate the procurement proceedings of the subject tender on the basis of detection of material governance issues pursuant to Section 63(e) of the Act and this recommendation was then approved by the 1st Respondent which resulted into Mr. Amos Mwaighonyi issuing tenderers in the subject tender with a Tender Cancellation Memo where bidders were notified that the tender had been terminated pursuant to Section 63(e) of the Act due to detection of material governance issues.

133. The question that comes up for this Board's determination is whether the Respondents decision to terminate the subject tender on the basis of detection of material governance issues has been substantiated and was in line with Section 63(1)(e) of the Act.

134. In answering the question that arises for our determination on what detection of material governance issues is, we note that governance and how it relates to public procurement is explained in the book **"Public Procurement: International Cases and Commentary, (2012)** edited by Louise Knight, as follows:

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrated a failure of governance and typically arises from corruption and fraud."

135. In essence, the principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromises the integrity of a procurement process of a tender. This Board has on numerous occasions addressed the question of what amounts to material governance issues in public procurement proceedings. In **PPARB Application No. 50 of 2020 Danka Africa (K) Ltd v The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Danka Africa Case") the Board deduced the meaning of material governance in public procurement to mean:

"Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean: significant or important governance issues detected in a procurement process that negatively affect

the capability of a procuring entity to guarantee compliance with principles of governance, leadership, and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process."

136. We note that a procuring entity which seeks to terminate a procurement process on account of detection of material governance issues bears the burden of establishing with specificity what the said material governance issues are in the procurement process of the tender and how they affect its capability to guarantee compliance with principles of Article 227 of the Constitution of Kenya.

137. The onus therefore lies squarely at the Respondents' doorstep to demonstrate to tenderers what these material governance issues were as to leave no room for conjecture in the minds of tenderers why the subject tender was terminated. This reasoning accords with the principles of transparency and accountability which are constitutionally envisaged as essential cogs in any public procurement process in Kenya.

138. Turning to the circumstances in the instant Request for Review, and having in mind the above explanation of detection of material governance

issues in public procurement, we are now called upon to determine whether the discord between the Evaluation Committee and Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management that clearly led to termination of the procurement proceedings in the subject tender can be termed as detection of material governance issues in the subject tender. This will be analysed in light of the role of the Evaluation Committee in procurement proceedings vis-à-vis the role of the Head of Procurement as provided under the Act and Regulations 2020.

139. Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee. Section 46 (4) further provides that:

"(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a

recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.”

140. Further, Regulation 30 of Regulations 2020 provides for conduct of the members of the Evaluation Committee as follows:

"In discharging the mandate provided for under the Act, members of the evaluation committee shall—

(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents;

- (b) perform the evaluation or negotiation with due diligence;***
- (c) conduct the evaluation within the periods specified in the Act;***
- (d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;***
- (e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and***
- (f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function."***

141. In essence, it is the sole responsibility of the Evaluation Committee to *inter alia* deal with evaluation of bids and complete the procurement process for which it was appointed while ensuring that it adheres to the provisions of Articles 201(d) and 227(1) of the Constitution and the evaluation criteria set out in the tender documents. Additionally, the Evaluation Committee is tasked with (a) conducting due diligence, (b) seeking clarifications on bids under consideration through the head of the procurement function and (c) preparation of a report on the analysis of bids evaluated and final ratings assigned to each bid and making recommendations to be submitted to the Head of Procurement Function.



142. In view of the above, we now deem it necessary to establish the meaning of evaluation and at what point evaluation comes to an end in a procurement process.

143. The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as:

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

144. Section 85 of the Act provides that:

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

145. From the above provisions and having noted the ordinary meaning of bid evaluation, we find that evaluation and comparison of tenders is conducted with a view of making recommendations to the accounting officer through the head of procurement to inform the decision of the award to the successful bidder.

146. Section 47 of the Act provides for the Procurement function as follows:

"(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.

(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.

(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement."

147. Regulation 33 of Regulations 2020 further provides for establishment and role of the procurement function as follows:

"1) A procuring entity shall establish a procurement function in accordance with section 47 of the Act.

(2) The procurement function shall be handled by the procurement professionals whose qualification and experience are recognized in Kenya.

(3) The role of the procurement function shall be—

(a) to maintain and continually update standing lists of registered suppliers for the procuring entity under sections 57 and 71 of the Act;

(b) to liaise with the Authority in respect of the Authority's register of procuring agents;

- (c) to prepare tender and asset disposal documents to facilitate fair competition;***
- (d) to prepare, publish and distribute procurement and disposal opportunities including invitations to tender, request for quotations and proposals, prequalification documents and invitations for expressions of interest;***
- (e) coordinate the receiving and opening of tender documents;***
- (f) to submit a list of registered or prequalified suppliers or contractors or consultants to the accounting officer for approval;***
- (g) to issue procurement and asset disposal documents to candidates in accordance with the Act and these Regulations;***
- (h) to propose the membership of relevant committees under the Act to the accounting officer for consideration and appointment;***
- (i) to coordinate the evaluation of tenders, quotations and proposals;***
- (j) to recommend for consideration of the negotiation of a procurement by the evaluation committee where negotiations are allowed by the Act and these Regulations and participate in negotiations;***
- (k) to prepare and publish tender awards;***
- (l) to prepare contract documents in line with the award decision;***
- (m) to prepare and issue debriefing letters;***

(n) to prepare contract variations and modifications documents;

(o) to maintain and archive procurement and asset disposal documents and records for the required period;

(p) to provide information, as required, for any petition or investigation to debar a tenderer or contractor or any investigation under review procedures;

(q) to implement the decisions of the accounting officer, including disposal committee and coordinating all procurement activities;

(r) to act as a secretariat to the evaluation, inspection and acceptance, and disposal committees;

(s) to liaise with the National Treasury or relevant county treasury and the Authority on matters related to procurement and asset disposal;

(t) to prepare and submit to the National Treasury or relevant county treasury and the Authority reports required under the Act, these Regulations and guidelines of the Authority;

(u) to monitor contract management by user departments to ensure implementation of contracts in accordance with the terms and conditions of the contracts;

(v) to report any significant departures from the terms and conditions of the contract to the head of the procuring entity or accounting officer;

(w) to recommend for transfer of a procurement or asset disposal responsibility to another procuring entity by the head of the procuring entity when need arises;

(x) to prepare consolidated procurement and asset disposal plans;

(y) to advise the procuring entity on aggregation of procurement to promote economies of scale;

(z) to co-ordinate internal monitoring and evaluation of the procurement and supply chain function;

(aa) to carry out market surveys to inform the placing of orders or adjudication by the relevant awarding authority;

(bb) to conduct periodic and annual stock taking;

(cc) to certify the invoices and vouchers to facilitate processing of payment to suppliers;

(dd) to recommend extension of the tender validity period;

(ee) to verify that the available stock levels warrant initiating a procurement process; and

(ff) to carry out any other functions and duties as are provided under the Act and these Regulations and any other functions that might be stipulated by the National Treasury or relevant county treasury, or the Authority."

148. In essence, the head of the procurement function is primarily responsible for rendering procurement professional advice to the accounting officer and is tasked *inter alia* with proposing the membership of relevant committees under the Act for the consideration of the

Accounting Officer while acting as a secretariat to the Evaluation, Inspection and Acceptance and Disposal Committees established under the Act.

149. With regard to rendering of procurement professional advice to the accounting officer, Section 84 of the Act provides for provision of a professional opinion by the head of procurement function to the accounting officer as follows:

"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."



150. The import of the above provision is that the head of procurement function as secretariat to the Evaluation Committee shall (a) review the tender evaluation report, (b) provide a signed professional opinion alongside the report by the evaluation committee to the accounting officer on the procurement and asset disposal proceedings. In the event that there is a dissenting opinion between the tender evaluation and award recommendations by the evaluation committee, the professional opinion may provide guidance on the procurement proceedings and in the making of a decision to award a tender, the accounting officer is obligated to take into account the views of the head of procurement provided in the signed professional opinion.

151. With this in mind, it is the Board's considered view that:

- i There were no dissenting opinions raised in the Evaluation Report concerning the subject tender's evaluation and award recommendation.
- ii The evaluation process in the subject tender came to an end upon submission of both the Evaluation and Due Diligence Reports by the Evaluation Committee to the Head of Procurement Function of the Procuring Entity.
- iii Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management overstepped his mandate provided under the Act in purporting to review and go through the bid document submitted by the Applicant, being the bidder recommended for award by the

Evaluation Committee, and render his findings as can be discerned at page 8 of 9 of the Professional Opinion issued to the 1st Respondent.

- iv Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management usurped the role of the Evaluation Committee by proceeding to inform the Chairman of the Evaluation Committee vide Memo dated 20th July 2024 that the Applicant had failed on two key components of the evaluation criteria and the Evaluation Committee was therefore required to re-evaluate Tenderer No. 2 and 3 (Canon Security Kenya Limited and Chakra Company Limited) for the sole purpose of award of the subject tender.

152. The Board is also of the considered view that the Applicant only came to extensively learn of the alleged material governance issues that were detected leading to termination of the procurement proceedings from the response by the Respondents in the instant Request for Review and submissions made by the Respondents at the online hearing of the instant Request for Review. We say so because our reading of the letter dated 27th August 2024 issued by the 1st Respondent to the Applicant does not disclose any of the issues enumerated hereinabove as to the allegations of detection of material governance issues leading to termination of the procurement proceedings in the subject tender. Moreover, the Internal Memo dated 7th July 2024 issued by Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management to tenderers in the subject tender notifying them of termination of the procurement proceedings in the

subject tender did not specifically lay out the material governance issues that had been detected in the procurement proceedings of the subject tender necessitating its termination.

153. In the circumstances, we find that the discord between the Evaluation Committee and Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management and his subsequent actions upon receipt of the Evaluation and Due Diligence Report leading to his recommendation for termination of the procurement proceedings in the subject tender cannot be considered to qualify as detection of material governance issues as stipulated under Section 63 (1)(e) of the Act. As such, the allegation of detection of material governance issues in the Evaluation Report submitted to Mr. Amos Mwaighonyi by the Evaluation Committee as claimed in the Internal Memo dated 7th July 2024 issued by Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management to all tenderers in the subject tender notifying them of termination of the procurement proceedings remain unsubstantiated.

154. We note that Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information to bidders. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application

challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to procuring entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does,



then the party so claiming has discharged its burden under section 63"

155. From the above holding which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. It is our considered opinion that fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination to all tenderers in the letter of notification of termination of procurement proceedings. With this information and evidence, aggrieved tenderers will critically weigh their options on whether or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination

156. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(e) of the Act and the aforesaid cases. This is due to the fact that they did not provide sufficient evidence of detection of material governance issues in the procurement proceedings as communicated to tenderers in the Internal Memo dated 7th July 2024 justifying termination of procurement proceedings in the subject tender.

With regard to procedural requirements for termination of procurement proceedings in the subject tender;

157. From the confidential file submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have established that the 1st Respondent approved on 26th June 2024 the recommendation made by Mr. Amos Mwaighonyi to terminate the procurement proceedings of the subject tender.

158. Pursuant to Section 63 (4) of the Act, the 1st Respondent is under an obligation to notify all bidders of such termination within 14 days of the termination and the said notice ought to contain the reason for termination. However, we note that the notification issued to bidders in the subject tender in the form of an Internal Memo dated 7th July 2024 was authored by Mr. Amos Mwaighonyi and not the 1st Respondent and during the online hearing, Mr. Mwaighonyi admitted that he had not availed any proof to show that he was authorized to exercise delegated authority as an accounting officer in issuing the said notification of termination of the procurement proceedings in the subject tender. We have also established that the said notification did not muster the threshold of a termination notice contemplated under Section 63 (4) of the Act for failing to sufficiently give reasons to all tenderers pertaining to the reason for termination of the subject tender.

159. Additionally, Mr. Amos Mwaighonyi submitted and admitted that three bidders being Canon Security Kenya Limited, Surveillance Kenya Limited and the Applicant herein were inadvertently not notified of the decision to terminate the procurement proceedings of the subject tender as communicated via email of 17th July 2024 attaching the Internal Memo dated 7th July 2024 informing tenderers of the said termination.

160. Despite the Respondents submission that a report was filed with the Director General, PPRA pertaining to the cancellation of the subject tender as stipulated under Section 63(2) & (3) of the Act, this Board has not had sight of the said report from the confidential file. No print out has been availed to the Board concerning the duly submitted written report on termination of the subject tender addressed to the Director General of the Authority as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal addressing the reasons for termination of the subject tender. At the very least, the Respondents would have adduced a copy of the PPIP print out as proof of having submitted the report on termination of the subject tender as uploaded on the PPIP website.

161. In the circumstances, we find that the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2), (3) & (4) of the Act have all not been met by the Respondents.

162. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 (1) (e) of the Act, the Board finds and holds that the purported cancellation of the subject tender's procurement proceedings was unlawful and illegal.

163. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act. The Board will therefore proceed to determine this matter on its merits.

Whether the Applicant's tender submitted in the subject tender was unfairly, unlawfully and illegally disqualified contrary to the provisions of the Tender Document as read with Section 80 (2) of the Act and Article 227(1) of the Constitution.

164. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

- a)**
- b)**
- c) and**
- d)"**

165. Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—

- (a)**
- (b)**



(c) good governance, integrity, transparency and accountability” [Emphasis ours].

166. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

167. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as “Misc. Application No. 60 of 2020”) spoke to the principles under Article 227 of the Constitution as follows:

“45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons

other than those specifically stipulated in the solicitation document.....”

168. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

“(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

“(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.”

169. Further Section 60(1) provides as follows:

“(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.”

170. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

171. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) The criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

172. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. Section 80 (3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

173. The Board further takes note of Section 86 (1) (a) of the Act that provides for the successful tender as follows:



"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b)

(c)

....."

174. It is a fact of this case that the criteria set out for evaluation of the subject tender is provided in Section III – Evaluation and Qualification Criteria of Part I- Tendering Procedures of the Tender Document which sets out at page 26 the process and stages of evaluation as follows:

"The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Document, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract.

The evaluation will be carried out through the following stages

Stage 1: Preliminary examination for determination of responsiveness

Stage 2: Technical Evaluation

Stage 3: Financial Evaluation

Stage 4: Post Qualification requirement and Award Recommendation.

175. In essence, evaluation of bids would be in 4 stages being Preliminary Evaluation, Technical Evaluation, Financial Evaluation and Post Qualification. Recommendation of an award of the subject tender would be made to the tender that met the qualification criteria, was determined substantially responsive to the Tender Document and had the lowest evaluated tender price.

176. It is not in contest that the Evaluation Committee of the Procuring Entity prepared an Evaluation Report signed by members of the Evaluation Committee on 24th May 2024 and concluded that the Applicant was the successful bidder having offered the lowest evaluated price and recommended for due diligence to be undertaken in line with Section 83 of the Act.

177. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.



(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

178. Further Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”

179. This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

180. Turning to the instant Request for Review we note that the Due Diligence Report signed by members of the Evaluation Committee on 28th May 2024 and submitted to the Board by the 1st Respondent confirms that a post qualification/due diligence exercise was carried out in line with the evaluation criteria set out under Stage 4: Post Qualification and Award Recommendation of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document.

181. According to the Due Diligence Report, the scope of due diligence was laid out as follows:



"

2.0 SCOPE OF DUE DILIGENCE

From number 1 above, due diligence may be conducted to verify the qualification of the tenderer who submitted the lowest evaluated responsive tenders. Should the lowest evaluated bidder fail the due diligence test, authentication will be done on the bidder who was determined to be the second lowest evaluated.

The following areas were covered during due diligence test based on what the bidder had submitted in their bid document:

- a) On experience of the bidder, we verified documents sent by the issuing institutions where bidder had previously undertaken similar assignments, and also physically confirmed the bidder's current clients [sic] sites.***
- b) NSSF Compliance details (remittance slips & schedule) were verified at bidder's site.***
- c) NHIF Compliance details (remittance slips & schedule) were verified at bidder's site.***
- d) Ownership of equipment by the bidder were verified at bidder's site.***
- e) Proposed key staff were asked to confirm if bidder sought their consent before proposing them.***
- f) Physical location of company offices was physically verified at site and the tenancy agreement confirmed.***



In addition, the committee carried out online authentication of the following documents;

- a) Tax compliance certificates (TCC) were checked at KRA Website***
- b) Form CR12 was confirmed through the eCitizen portal to verify identity of directors and legal existence of the organization.***
- c) The authenticity of Access to Government Procurement Opportunities (AGPO) certificate was checked with the National Treasury website.***
- d) Professional standing of the audit firm confirmed through teh [sic] ICPAK website.***

3.0 RESULTS OF THE EXERCISE AND RECOMMENDATION

At the end of the due diligence exercise, responses received were reviewed as tabulated below:-

<i>S/No</i>	<i>Parameters</i>		<i>Bidder No. 356/4</i>
<i>1</i>	<i>Tenancy Agreement for offices</i>		<i>Y</i>
<i>2</i>	<i>Firms' Experiences</i>		<i>Y</i>
<i>3</i>	<i>Equipment</i>		<i>Y</i>
<i>4</i>	<i>Key Staff</i>	<i>Site Manager</i>	<i>Y</i>
		<i>Supervisor</i>	
<i>5</i>	<i>NSSF Compliance</i>		<i>Y</i>
<i>6</i>	<i>NHIF Compliance</i>		<i>Y</i>
<i>7</i>	<i>CR 12 Online Checker</i>		<i>Y</i>
<i>8</i>	<i>TCC Online Checker</i>		<i>Y</i>

9	ICPAK Auditor Online Check	Y
		Pass
<p>Key: X-Negative Feedback Received; Y- Positive Feedback received</p> <p>NRR: No Response Received as at the date of signing the due diligence report.</p>		

4.0 COMMITTEE'S RECOMMENDATION

Following the due diligence process, the committee upholds its recommendation for the award of the tender to the lowest evaluated bidder, M/s Lindum Systems Limited of P.O. Box 1844-40100, Kisumu, being the Lowest evaluated Bidder for bid price of Kenya Shillings Ten Million, One Hundred Thirteen Thousand, Nine Hundred Twenty-Four and Zero Cents (Kshs. 10,113,924.00)

182. The due diligence exercise being the last stage of evaluation in the subject tender was only done on the Applicant being the successful tenderer who had submitted the lowest evaluated responsive tender and having passed the said exercise, it had a legitimate expectation that it would be issued with a letter of notification of intention to award the subject tender.

183. However, vide letter dated 27th August 2024, the Applicant was informed that it lacked the human resource capacity to undertake the

subject tender in view of the capacity from its clientele references being regarded as low compared to the Procuring entity's capacity of 56 guards stipulated in the Scope and Description of Services Section (B) at page 71 of the Tender Document. Further, during the online hearing, the Respondents in their submissions took issue with the Applicant's Books of Audited Accounts for the years 2020 and 2021 submitted in its bid document claiming that there were anomalies therein that ought to have been discovered during the due diligence exercise.

184. It has been determined elsewhere in this decision that evaluation of the subject tender was completed upon issuance of the Evaluation and Due Diligence Report by the Evaluation Committee to the Head of the Procurement Function of the Procuring Entity.

185. We have established that the alleged evaluation of the Applicant's tender by Mr. Amos Mwaighonyi, the Ag. Manager Supply Chain Management and his subsequent actions upon receipt of the Evaluation and Due Diligence Report leading to his purported disqualification of the Applicant's tender on the basis of lacking human resource and financial capacity is an introduction of an extrinsic evaluation criteria after the post qualification stage and is contrary to the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution. In saying so, we are guided by both the Evaluation Report and Due Diligence Report prepared by the Evaluation Committee which determined the Applicant's bid document responsive at the Preliminary Evaluation stage, the Technical Evaluation stage, the Financial Evaluation stage and the Post

Qualification stage in evaluation of bids submitted in the subject tender noting that the Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids.

186. In the circumstances, the Board finds that the Procuring Entity unfairly, unlawfully and illegally disqualified the Applicant's tender submitted in the subject tender and holds the Procuring Entity in breach of the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution. Accordingly, this ground of review succeeds and is allowed.

What orders the Board should grant in the circumstances?

187. We have found that the Respondents' Addendum 1. For Management Response Reference Number: ACFC/RD & CE/P.10/2024 Dated 3rd September 2024 for the Procurement Proceeding Review Request Made by M/S Lindum Systems Ltd for Tender Reference Number: ACFC/HR/02/2024/25-6: Provision of Security Services to Agro Chemical and Food Company Limited filed on 16th September 2024 was filed out of time. Further that it was filed without leave of the Board and that consideration of the issues raised therein would be prejudicial to the Applicant leading to the conclusion that it ought to be struck out.

188. The Board has also found that the Respondents unfairly, unlawfully and illegally disqualified the Applicant's tender submitted in the subject tender

contrary to the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.

189. The Board has further found that the Respondents failed to satisfy both the substantive statutory pre-conditions of termination of procurement proceedings of the subject tender in accordance with Section 63 of the Act hence the purported cancellation of the subject tender's procurement proceedings was unlawful and illegal. Termination of procurement proceedings affects all tenderers as it eliminates the entire tender and denies a tenderer who ought to have been the successful tenderer award of the tender.

190. Consequently, the subject tender's re-advertisement by the Procuring Entity's and subsequent procurement processes on the same are unlawful and null and void by extension.

191. With regard to the prayer sought for extension of the subject tender's validity period, we note that Section 173 of the Act donates wide discretionary powers to the Board and being guided by the holding of the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** which referred to the decision of **Onyiego, J. in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another [2021]** in addressing the

power of the Board to direct a procuring entity to extend the validity period of the tender, the court held as follows:

"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period..."

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.



41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the Interested Party that Section 88 (3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...

49. Under section 173(a) (b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity

period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favorable.”[Emphasis ours]

192. The import of the aforementioned Court of Appeal case is that the Board has the powers to extend the tender validity period to avert situations where an accounting officer of a procuring entity misuses the powers under section 88 of the Act to frustrate tenderers or to frustrate the procurement process. As such, to enable the Respondents comply with orders of the Board in the instant Request for Review, we find that there is need for extension of the subject tender’s validity period.

193. Consequently, we hereby extend the subject tender’s validity period by a further ninety (90) days from 17th July 2024. Effectively, the 2nd Respondent is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender’s validity period for a further ninety (90) days from 17th July 2024.

194. We deem it fit and just to order for the re-instatement of the Evaluation Report and Due Diligence Reports prepared by the Procuring Entity’s Evaluation Committee and to direct the Head of Procurement Function to proceed with preparation of the relevant Professional Opinion while taking cognizance of the Board’s findings herein and for the 1st Respondent to ensure that the procurement proceedings of the subject tender proceed

to their logical conclusion within Twenty one (21) days from the date of this decision including making of an award to the lowest evaluated bidder in the subject tender.

195. In totality, the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

196. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in this Request for Review:

- A. The Respondents' Addendum 1. For Management Response Reference Number: ACFC/RD & CE/P.10/2024 Dated 3rd September 2024 for the Procurement Proceeding Review Request Made by M/S Lindum Systems Ltd for Tender Reference Number: ACFC/HR/02/2024/25-6: Provision of Security Services to Agro Chemical and Food Company Limited filed on 16th September 2024 be and is hereby struck out.**

- B. The decision to terminate the procurement proceedings of Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services be and is hereby annulled and set aside.**



C. The decision by the Respondents to advertise and publish Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services (Re-advertisement) including any subsequent procurement processes undertaken with respect to the said tender be and are hereby annulled and set aside.

D. The tender validity period of Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services be and is hereby extended for a period of 90 days from 17th July 2024.

E. Further to Order No. D above, the 1st Respondent is hereby directed to issue written notifications to all tenderers in Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services notifying them of extension of the tender validity for a period of 90 days from 17th July 2024.

F. The Procuring Entity's Professional Opinion dated 4th June 2024, Internal Memos dated 20th June 2024, 26th June 2024, 7th July 2024 and the letter addressed to the Applicant dated 27th August 2024 with respect to the procurement proceedings of Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services be and are hereby nullified and set aside.



G. The 1st Respondent is hereby ordered to ensure that the procurement process with respect to the procurement proceedings of Tender No. ACFC/HR/02/2024/25-6 for Provision of Security Services proceeds to its lawful and logical conclusion within 21 days of this decision taking into consideration the Board's findings herein including the Board's finding on the evaluation and recommendation of award of the subject tender, the provisions of the Tender document and the Act, the Constitution and Regulations 2020.

H. Further to Order G above, the 1st Respondent is hereby ordered to submit a report to the Board on compliance of the orders issued herein within twenty one (21) days from the date of this decision.

I. In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 20th Day of September 2024.


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB



